CONTENTS

I. INTEREST OF *AMICUS CURIAE* 2

II. REASONS FOR GRANTING THE WRIT 3

III. CONCLUSION 10

CITATIONS

CASES

United States v. *Chenery Corp.*
332 U.S. 194 (1947) 6

United States v. *Seatrain Lines, Inc.*
329 U.S. 424 (1947) 5

United States v. *Denver &Rio Grande Western Railroad Co.*
385 F.2d 161 (10th Cir. 1967)..... 6

STATUTES AND REGULATIONS

Transportation Act of 1920, §405, 41 Stat. 479.. 8

Act of Mar. 4, 1927, §1, 44 Stat. 1447 8

Interstate Commerce Act, as amended:

49 U.S.C. §3(2).....2, 3, 5, 6, 7, 8, 9

49 U.S.C. §16(8).....2, 3, 4, 5, 6, 7, 8, 9

49 U.S.C. §16(9)..... 5

49 U.S.C. §909..... 5

49 C.F.R. §§142.1 - 142.14 .....2, 3, 4, 5

INTERSTATE COMMERCE COMMISSION PROCEEDINGS

Regulations For Payment of Rates and Charges
(Ex Parte Docket No. 73)
57 I.C.C. 591 (1920) 2

Regulations For Payment of Rates and Charges
(Ex Parte Docket No. 73)
326 I.C.C. 483 (1966) 4

MISCELLANEOUS

H.R. Rep. No. 456, 66th Cong., 1st Sess. (1919) . 7, 8

H.R. Rep. No. 650, 66th Cong., 2d Sess. (1920) . 8

H.R. Rep. No. 1508, 69th Cong., 2d Sess. (1927) . 9

H.R. Rep. No. 2283, 69th Cong., 2d Sess. (1927) . 9

S. Rep. No. 309, 69th Cong., 2d Sess. (1926) 9

H.R. 10453, 66th Cong., 1st Sess. (1919) 7

H.R. 10453, 66th Cong., 2d Sess. (1919) 7

H.R. 12065, 69th Cong., 2d Sess. (1927) 9

S. 3286, 69th Cong., 2d Sess. (1927) 9

Freight Commodities Report
(I.C.C. Form QCS) 3

Carload Waybill Statistics 1964
(I.C.C. Statement SS-1) August, 1967 3

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1259

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Association of American Railroads hereby files its Brief *amicus curiae* in support of the Petition For Writ of Certiorari in this case, pursuant to Rule 42 of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Solicitor General of the United States on behalf of the United States of America. The Denver & Rio Grande Western Railroad Company has consented to the filing of this Brief by letter of March 19, 1968 addressed to the Clerk of the Supreme Court. Such letter is in the possession of the Clerk of this Court.

I. INTEREST OF THE AMICUS CURIAE

The Association of American Railroads (the AAR) is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. The member railroads operate more than 95 per cent of the total railroad mileage and have operating revenues of approximately 98 per cent of the total railroad operating revenues of all railroads in the United States. The activities of the AAR cover a wide range, having to do with such matters as research, operations, car service, safety, public relations, accounting, statistics, law, and Federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The AAR is the joint representative and agent of these railroads in connection with legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of Federal legislation that will apply generally to all of its members. The issues raised in the present case relating to the credit regulations (49 C.F.R. §§ 142.1-142.14) promulgated by the Interstate Commerce Commission [1] pursuant to section 3(2) of the Interstate Commerce Act (49 U.S.C. § 3(2)), and the proper construction of the limited penalty provisions of Section 16(8) of that Act (49 U.S.C. § 16(8)), are important to the entire railroad industry.

---

[1] The continuing docket number of Interstate Commerce Commission proceedings conducted pursuant to Section 3(2) of the Interstate Commerce Act (49 U.S.C. § § 3(2)) is Ex Parte No. 73. See, *Regulation of Payment for Rates & Charges*, 57 I.C.C. 591 (1920).

II. REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States should grant the Petition For Writ of Certiorari because the decision of the Court of Appeals for the Tenth Circuit is in error; because the error has an important adverse impact upon a fundamental principal of federal administrative law; and because such error, if not corrected, will result in continuing injury to the entire railroad industry of the United States. It is the latter reason which has caused this *amicus curiae* Brief to be filed.

Every railroad operating in interstate commerce in the United States is subject to the credit regulations of the Interstate Commerce Commission (49 C.F.R. §§ 142.1—142.14). Likewise, every such railroad is subject to enforcement proceedings for violation of Section 3(2) of the Interstate Commerce Act (49 U.S.C. § 3 (2)). It is a matter of great importance to the railroads that the proper enforcement statute be utilized and that the excessive and inflexible forfeiture provisions of Section 16(8) (49 U.S.C. § 16(8)) not be used erroneously for such purpose.

As a result of the decision below every shipment of freight moved by railroad under a bill of lading in interstate commerce and delivered to a consignee in the United States carries with it the potential subjection of the collecting carrier to the forfeiture provisions of Section 16(8). In 1966, the most recent year for which figures are available, there were over 19 million such shipments for carload traffic alone.[2]

[2] This estimate is based upon the Freight Commodities Reports (I.C.C. Form QCS) submitted to the Interstate Commerce Commission by individual railroads for 1966 adjusted to eliminate intrastate shipments by use of Carload Waybill Statistics 1964 (I.C.C. Statement SS-1) August 1967.

The immense volume of rail movements in interstate commerce thus affected implores the consideration by this Court of the issues raised below. Perhaps of equal importance it reflects the nature of the credit regulation (49 C.F.R. §§ 142.1—142.14) which have been adopted to cope with the problem presented by the settlement of rates and charges. The regulations deal with an area of exchange in which the payment of charges or the failure to do so promptly is not entirely within the controllable province of the regulated carrier. Some violations of the credit regulations are inevitable and the Interstate Commerce Commission expressly found in a 1966 decision "... that shippers are the major cause of violations." *Regulation of Rates and Charges,* 326 I.C.C. 483, 487 (Docket Ex Parte No. 73, 1966). The subjection of the carriers to the extreme forfeiture provisions of Section 16(8) for "violations" is clearly inconsistent with such circumstances.

In the latest proceeding under Docket Ex Parte No. 73 the Bureau of Enforcement of the Interstate Commerce Commission sought to make the credit regulations more stringent. The Commission declined to do so stating that:

> "[T]here are many reasons for credit violations which are beyond correction by rules; [and] stringent credit rules as proposed by the Bureau would destroy the flexibility needed to meet problems of this nature." (Id. at 489-490)

If the credit regulations are held to be subject to the harsh forfeiture provisions of Section 16(8) they become rigid and incapable of meeting "problems of this nature." Section 16(8) forfeitures are not suitable for enforcement of regulations like the credit regulations,

and the clear language of Section 16(8) and Section 3 (2), read together, precludes such use.

The Court of Appeals, without a proper statutory basis has unwarrantedly increased the scope of the forfeiture provision of Section 16(8) and the enforcement provision of Section 16(9) of the Interstate Commerce Act, as amended (49 U.S.C. §§ 16(8) and 16(9)). The holding of that Court is based on an erroneous and inconsistent interpretation of Section 3(2) of that Act (49 U.S.C. § 3(2)), and the credit regulations issued pursuant thereto (49 C.F.R. §§ 142.1—142.14).

The question of the interrelationship between Sections 16(8) and 3(2) of the Interstate Commerce Act, which the Court of Appeals deems to exist, has not been considered by this Court prior to this case. Indeed, the issues raised below, had until this case, never been considered by a Federal Court of appellate jurisdiction, because for the first forty-four years that these two sections were in existence a violation of the credit regulations had not been considered punishable under the forfeiture provisions of Section 16(8).

Within Section 3(2) of the Interstate Commerce Act Congress has authorized the Interstate Commerce Commission to establish "rules and regulations" and has specifically omitted any reference to "orders" therein. The opinion of the Court of Appeals which incorrectly inserts the word "orders" into Section 3(2) would appear, in at least one respect, to be in conflict with *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947). In that case this Court ruled that the absence of the word "order" in Section 309 of the Interstate Commerce Act, (49 U.S.C. § 909), prohibits the Commission and the Courts from including it. The Supreme Court should

grant the Petition filed herein and review the apparent inconsistency of the Court of Appeals' decision.

The Court of Appeals made no reference to the *Seatrain* case but did incorrectly refer to a statement made by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947). Citing the *Chenery* case the lower court referred to the purpose of the "order" in Docket Ex Parte No. 73 as being to fill the gap in the "interstices of the Act * * * through * * * quasi legislative promulgation of rules." The *Chenery* case has no application here. This Court did not, in that case, say that rules are the same as orders nor did it say that the use of the clause "it is ordered" makes a rule an order (as does the Court of Appeals). In its discussion, however, the Supreme Court observed that rule-making, as much as possible, should be performed by promulgation of rules to be applied in the future rather than to rely upon *ad hoc* adjudication. Id. at 202.

In clear and unambiguous terms Section 16(8) provides a forfeiture for violation of "any order" issued under Section 3 of the Act. Paragraph (2) of Section 3, however, in clear and unambiguous terms authorizes the Commission to prescribe "rules and regulations" to govern the settlement of rates and charges and makes no mention of "orders." In considering the meaning of the term "any order" in Section 16(8) the Court of Appeals held that:

> "An unambiguous statute must be given effect according to its plain and obvious meaning. [citations omitted] We find no ambiguity in § 16(8)." 385 F.2d 161, 163 (10th Cir. 1967)

Equally plain and obvious are the terms "rules and regulations" used in Section 3(2). There is no ambiguity there. It is difficult to understand how the lower

court can ignore the "plain and obvious meaning" of Section 3(2) and rewrite it to accommodate Section 16(8). But leaving aside the fact that these provisions are clear on their face, reference to the legislative history supports the same interpretation.

The legislative history of Section 16(8) and Section 3(2) indicates that there is no direct relationship between the two. As originally passed by the House of Representatives as Section 424 of H.R. 10453 [3] and as passed by the Senate as Section 46 of the Senate amendment to H.R. 10453,[4] what is now Section 16(8) was written in its present form. The House and Senate versions differed to some degree on the provisions contained in Section 3 relating to joint use of terminals and facilities but neither version contained the provision relative to the extension of credit.[5]

The report which had accompanied the original House passed version clearly stated that the intent of Section 424 thereof was to amend Section 16 to

> include under the penalty provisions for failure to obey orders of the Commission, the failure to obey orders made under the provisions (1) regarding the joint use of terminals and (2) change of interstate rates where the Commission finds that such rates constitute an undue preference. . . .[6]

[3] 66th Cong., 1st Sess. (1919)

[4] 66th Cong., 2d Sess. (1919)

[5] Section 405 of H. R. 10453 as originally passed by the House amended Section 3 with respect to the joint use of facilities and terminals, giving the Commission the authority to require by order such joint use while Section 36 of the Senate's amended version of H. R. 10453 failed to extend this authority to the Commission.

[6] H. R. Rep. No. 456, 66th Cong., 1st Sess., 30 (1919)

Obviously Section 16(8) was not intended to apply to the credit provisions because they were not a part of the bill at that time. The provisions to which Section 16(8) was to apply, however, were clearly indicated. This above quoted provision of H.R. Report No. 456 is the most accurate and compelling statement of congressional intent as to the new subject matter to which Section 16(8) was to apply after 1920.

It must be noted that Section 16(8) was not changed after H.R. Report No. 456 was written. Yet, with Section 16(8) in its final form Congress added what is now Section 3(2).[7] With the knowledge that Section 16(8) referred only to Commission "orders," Congress specifically omitted any reference to orders in Section 3(2). Instead, authorization was extended to prescribe "rules and regulations" when the House and Senate conferees met to rewrite Section 3 as it finally appeared.

The decision of the Court of Appeals is in derogation of the congressional intent as is clearly established by the legislative history of these two sections.

In 1927 Congress amended Section 3(2)[8] as an expression of intent that the Interstate Commerce Commission be given the freedom to give full consideration to the needs of carriers and shippers in establishing the credit regulations. Prior to 1927 Section 3(2) had provided that the rules were "to assure prompt payment" of the charges. (Transportation Act of 1920, § 405, 41 Stat. 479). These words gave way to the words "govern the settlement" of charges. In the one rele-

---

[7] Conference Report, H. R. Rep. No. 650, 66th Cong., 2d Sess., 27 and 63 (1920).

[8] 44 Stat. 1447 (1927)

vant statement of the intent of Congress in making this change it was stated that the new language

> . . .would permit of a sufficient additional freedom of action on the part of the Commission in providing the rules and regulations to accomplish [a liberalization of the credit regulations].[9]

Such language necessarily bespeaks an intent that the determinative "orders" referred to in Section 16(8) are not contemplated by the authority granted in Section 3(2) where it expressly provides for the establishment of "rules and regulations." The Court of Appeals decision ignores the legislative intent and runs contrary to the procedures Congress has adopted to enable the Commission to regulate the settlement of charges between carrier and shipper.

Section 16(8) has absolutely no direct relation to the clear purpose of the credit regulations promulgated by the Interstate Commerce Commission under authority of Section 3(2). It should be clearly settled by this Court that the regulations issued by the Interstate Commerce Commission under authority of Section 3(2) are not "orders" and that the forfeiture provisions of Section 16(8) cannot be expanded in an attempt to reach alleged deviations from the Commission's credit regulations.

---

[9] S. Rep. No. 1508, 69th Cong., 2d Sess., 2 (1927) to accompany H. R. 12065. The amendment to Sec. 3(2) contained in H. R. 12065 was identical to that contained in S. 3286 which was subsequently enacted in lieu of H. R. 12065 (Act of March 4, 1927, 44 Stat. 1447). The abbreviated reports which accompanied S. 3286 [H.R. Rep. No. 2282 and S. Rep. No. 309, 69th Cong., 2d Sess. (1927)] did not contain any reference to the change in Section 3(2).

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be issued as requested by the Denver & Rio Grande Western Railroad Company.

WILLIAM M. MOLONEY
CARL V. LYON
HOLLIS G. DUENSING
929 Transportation Building
Washington, D.C. 20006
Attorneys for *Amicus Curiae*
Association of
American Railroads

March 29, 1968

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

CARL V. LYON
929 Transportation Building
Washington, D. C. 20006
Attorney for *Amicus Curiae*
Association of American Railroads

March 29, 1968.